IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.348 of 2003

In

Second Appeal No.239 of 2003

Shri Laxman Narayan Gharge and Ors..Applicants

(Orig.defts 1 and 2)

V/s

1. Smt.Indirabai Laxman Bhandare

deceased

2. Madhukar Laxman Bhandare and Ors..Respondents

(Orig.pllfs)

Shri R.A.Thorat for Applicant

Shri Praful B. Shah for Respondent

CORAM:S.R.SATHE,J.

DATED:5th May 2006

P.C.:-

. The Applicant-Appellants, original defendant nos 1 and 2 have filed the present application to stay the operation, execution and implementation of the judgment and decree dated 21-2-2002 passed by the 3rd Additional

District Judge, Satara in Regular Civil Suit No.245 of 1990 only to the extent of granting permanent injunction against the present applicants, restraining them from obstructing plaintiffs' possession of the suit land.

2. Brief facts giving rise to this application are as under :

. The suit land bearing Block No.834 admeasuring 5 Hecter 2 Ares situated at Wadgaon, Taluka Khatav, District Satara is the ancestral property of husband of plaintiff no.1 (Laxman) and original defendant no.3. As a result of service of the defendant no.3 he was residing at different places and was not actually cultivating the land of the joint family. In the year 1987 or thereabout he started cycle shop at Pandharpur. Laxman and his father Sitaram were cultivating the agricultural land. According to the plaintiffs the defendant no.3 started complaining that he was not getting sufficient income out of the joint family land and as a result of the same he suggested that the plaintiff should purchase his share. Accordingly, oral agreement also took place. However, the price was not finalised as the defendant no.3 was to make enquiry about the current market rate. However, all of a sudden plaintiffs came to know that defendant no.3 has sold his share out of the suit property to defendant nos.1 and 2.

On the basis of the said sale deed defendant nos.1 and 2 started obstructing the plaintiffs' possession of the suit land. According to the plaintiffs, the defendant no.3 had in fact no right to sale the said land to defendant nos.1 and 2 and plaintiffs were in fact having right of pre-emption. The plaintiffs, therefore filed a suit for specific performance of an agreement to sell against the defendant no.3 and also prayed for permanent injunction restraining defendants from obstructing plaintiffs' possession of the suit land.

3. The Defendants nos 1 and 2 filed their written statement at Exh.22 and opposed the suit claim and contended that partition of the suit land had taken place between defendant no.1's husband and defendant no.3 and southern portion was allotted to the share of defendant no.3. Before 1949 Laxman had given his half share to Pandu Daulat Gharage and Shripati Bharge on **Batai** basis. Defendant no.3 also gave his share to the grand father of defendant nos.1 and 2 for cultivating the land as tenant thereof. Accordingly, necessary entries were also made in the record of rights. Thus, according to the present applicants the original defendant nos.1 and 2, the land was being cultivated initially by Tayapa and father of defendant nos.1 and 2 till the execution of the sale deed. By virtue of sale deed their possession in the land was confirmed. They

therefore opposed the plaintiffs' claim.

4. The defendant no.3 also filed separate written statement at Exh.18 and contended that he has received southern share in the partition. There was no oral agreement as alleged by the plaintiffs and he has sold the suit land to defendant nos. 1 and 2, which was initially being cultivated by grand father of defendant nos.1 and 2 on behalf of defendant no.3. The defendant no.3 also therefore prayed for dismissal of the suit.

5. On these pleadings the learned trial Judge framed issues and after considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that partition had taken place between plaintiff and defendant no.3 in 1941 and southern portion was allotted to the share of defendant no.3. He had given the said land to the grand father of the defendant nos.1 and 2 as a tenant and the said possession was confirmed in the sale deed executed on 9-3-1987 by the defendant no.3 in favour of defendant nos. 1 and 2. The trial Court also held that there is no evidence to show that defendants obstructed the plaintiffs' possession. He also held that plaintiffs have failed to prove that there was any final agreement to sale the suit land, between the plaintiffs and defendant no.3. He therefore, dismissed the plaintiffs'

suit.

6. Being aggrieved by the same, the original plaintiffs filed first appeal No.245 of 1990. The learned first Appellate Court, however, came to the conclusion that there was no evidence to show that the partition had taken place as contended by the defendant no.3 and though for some time the land was cultivated by Tayapa it was not as a tenant but as a labourer and the land was not in exclusive possession of the defendant no.3. It was also held that contention of the defendant that he was put in possession of southern portion is not correct. Nor the defendant nos.1 and 2 received separate possession of southern share under sale deed in question. The first appellate court also held that plaintiffs have failed to prove the alleged oral agreement to sell between the plaintiffs and defendant no.3. The learned Additional District Judge held that admittedly the suit property is the joint family property of plaintiffs and defendant no.3 and there is no evidence regarding alleged partition. Though it is correct that defendant no.3 was entitled to sell his undivided share in the property he was not in a position to hand over any specific portion of the joint family land to the defendant nos.1 and 2 and the defendants 1 and 2 have in fact not received any such possession. From the revenue record and one **Kabje pavati** dated

26-2-1958 it is clear that the plaintiffs received possession from the tenancy court and mutation entries in that behalf is also certified. He, therefore, partly allowed the appeal and confirmed the finding regarding rejection of the specific performance but set aside the trial court's order rejecting the injunction. The first appellate court issued permanent injunction restraining the defendant nos.1 and 2 from obstructing plaintiffs' possession of the suit property.

7. Against the above mentioned order the original defendant nos.1 and 2 filed present second appeal and the present application for stay to the implementation and execution of the order passed by the first appellate court.

8. I have heard both the learned Advocates. Shri Thorat, learned Advocate for the Applicants-Appellants submitted that the said land was initially in possession of Tayapa and Narayan as tenants. They were put in possession by defendant no.3 as he had received the said land in partition. The defendant no.3 executed sale deed dated 19-3-1987 in favour of the defendant nos.1 and 2 and they were put in possession of the suit land. According to him the learned first appellate court did not properly consider 7x12 extract produced on record and wrongly held that suit land was in possession of the

plaintiffs. He also submitted that in the present appeal the applicant has produced copy of 7x12 extract of the suit land pertaining to period 1999 to 2003 wherefrom it appears that the present defendant nos.1 and 2 are in possession of the suit land. Not only that but he has also produced xerox copies of some receipts to show that defendant nos.1 and 2 had in fact taken a bore well in the suit land and supplied crop out of the said land to M/s Prakash Traders. He therefore submitted that execution and operation of the order passed by the first appellate court, whereby permanent injunction is granted against them, defendant Nos.1 and 2 be stayed.

9. As against this, Shri Shah, learned Advocate for the original plaintiffs supported the order passed by the first appellate court whereby the permanent injunction is issued against the present applicants, original defendant nos.1 and 2. He submitted that the appellant cannot rely upon the receipts and 7x12 extracts which are produced in this Court for the first time, particularly when, he has not moved an application seeking permission under Order 41 Rule 27 of Code of Civil Procedure. He also submitted that the learned first appellate Court has considered the entire evidence and rightly issued injunction against defendant nos. 1 and 2. The said order is in operation since the year

2003 and as such there is no necessity at this stage to interfere with said order and stay the same.

10. From the perusal of the record it is very clear that this second appeal is admitted on 22-7-2003. The present application was in fact submitted along with the appeal or immediately thereafter but till this time the Appellants did not press the same. It seems that at times the Appellants/applicants had in fact sought time for taking steps for effecting service to Respondnt no.3. Thus, when the order of permanent injunction issued by the first appellate court in the year 2003 is in operation for last about 3 years, the question arises, whether now it should be stayed. We cannot ignore the fact that if the said order is stayed at this stage it may create further complications.

11. In order to succeed in this application, the applicants, the original appellants defendants must prima facie shows that the order passed by the first appellate court is not legal and correct. They must show that even as on today they (defendant nos. 1 and 2) are in actual possession of the suit land and as such it is necessary to stay the order passed by the first appellate court.

12. It is not in dispute that the land in question is

the ancestral land of plaintiff no.1 and defendant no.3. Though the defendant no.3 has taken contention that the said land was partitioned in the year 1941 admittedly there is no document of partition, nor there is any cogent material on record to show that the land in question was actually divided and defendant no.3 was put in possession of separate portion i.e. southern portion of the land. It is true that in the old 7x12 extracts there was entry showing the name of Tayappa as a person cultivating the land. However, the said entries were till the year 1956-57. It is pertinent to note that mode of cultivation shown therein is "4". Since 1957-58 the name of deceased Laxman Bhandare was appearing in crop column and mode of cultivation is "2". The entry for 1957-58 shows that predecessor of the plaintiffs was cultivating the land through labourer. So, even if we assume that predecessor of the defendant nos. and 2 was cultivating the suit land, still, there is no sufficient evidence to show that they were doing so in their capacity as tenants and that they were in exclusive possession of the suit land. As against this, the plaintiffs have produced certified copy of mutation entry No.2380 from which it appears that the plaintiffs obtained the possession of the suit land as per Kabje pavti dated 26-2-1958 through the tenancy authorities but the said receipt cannot be ignored when there is no sufficient evidence to show that no proper procedure was

followed while making the said entry. In fact 7x12 extract of the suit land Exh.4 for the year 1986-87 shows that the plaintiffs and defendant no.3 were in joint possession of the same. So, certainly, there is no sufficient evidence to show that the defendant no.3 was in exclusive possession of the southern portion of the suit land.

13. It is not in dispute that defendant no.3 has sold his share in the suit land to defendant nos.1 and 2 on 9-3-1987. The said sale deed is not on record for perusal. However, the learned first Appellate Court has specifically observed that as per the said sale deed the defendant no.3 has sold his "half undivided share in the suit land to defendant nos.1 and 2". The learned first Appellate Judge has rightly held that as per the provisions of Hindu Law if a stranger has purchased undivided share of any coparcner and has not actually received the possession of specific portion then he cannot be put in joint possession with other co-parcners. It is not argued before me by the learned Advocate for the applicants that in the sale deed it is specifically mentioned that southern half portion which was received by defendant no.3 by partition has been actually given in possession of defendant nos. 1 and 2. On the contrary even the learned trial Judge has observed that no possession was handed over to the

defendant nos.1 and 2 under the sale deed. So having regard to all these facts, it does appear that the learned first Appellate Court has properly considered the entire evidence and issued injunction against the present Appellants.

14. It is pertinent to note that copies of receipts produced by the applicants in this Court are pertaining to the period prior to decision of the first appellate court which is dated 21-12-2002. So though those documents were available to the present applicants they did not produce the same in the first appellate Court. Besides this, mere production of xerox copies of those receipts are not sufficient to jump to the conclusion that the present applicants are in actual possession of the suit land. In some of the receipts there is no mention of even the Survey number of the land. So far as the latest 7x12 extract copy of which is produced by the applicants at Exh.L in fact shows the name of original plaintiff no.1 as the person in possession of the land. So, this also shows that even as on today the plaintiff is in possession of the suit land. All the revenue assessment receipts pertianing to the land are produced by the plaintiff in the trial Court. So, considering all these factors I have no hesitation to hold that Applicants-Appellants have failed to make out even prima facie case to show that it is necessary to

stay the execution and operation of the order passed by the first Appellate Court whereby on 20-12-2002 the first Appellate Court issued permanent injunction against the present applicants.

15. In this view of the matter the application is dismissed.

(S.R.SATHE,J.)